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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Trisha Marie Jimenez,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-18-08132-PCT-DLR

ORDER

15
16 Plaintiff applied for disability insurance benefits on August 25, 2014, alleging
17 disability beginning July 22, 2014. (A.R. 16.) The claim was denied initially on January
18 7, 2015, and upon reconsideration on April 29, 2015. (*Id.*) Plaintiff then requested a
19 hearing. (*Id.*) On March 20, 2017, Plaintiff, her representative, and a vocational expert
20 (VE) testified at a hearing before an Administrative Law Judge (ALJ). (*Id.* at 37-62.) The
21 ALJ issued a written decision on June 5, 2017, finding Plaintiff not disabled within the
22 meaning of the Social Security Act. (*Id.* at 16-28.) This became the Commissioner's final
23 decision when the Appeals Council denied review. (*Id.* at 1-3.)

24 On June 22, 2018, Plaintiff sought review by this Court. (Doc. 1.) After receipt of
25 the administrative record (Doc. 11), the parties fully briefed the issues for review (Docs.
26 14-16). For reasons stated below, the Court reverses the Commissioner's decision and
27 remands for an award of benefits.
28

1 **BACKGROUND**

2 To determine whether a claimant is disabled for purposes of the Social Security Act,
3 the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). At the first step, the ALJ
4 determines whether the claimant is engaging in substantial gainful activity. §
5 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. At step two, the
6 ALJ determines whether the claimant has a “severe” medically determinable physical or
7 mental impairment. § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the
8 inquiry ends. At step three, the ALJ considers whether the claimant’s impairment or
9 combination of impairments meets or medically equals an impairment listed in Appendix
10 1 to Subpart P of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is
11 automatically found to be disabled. If not, the ALJ proceeds to step four. At step four, the
12 ALJ assesses the claimant’s residual functional capacity (RFC) and determines whether the
13 claimant is still capable of performing past relevant work. § 404.1520(a)(4)(iv). If so, the
14 claimant is not disabled and the inquiry ends. If not, the ALJ proceeds to the fifth and final
15 step, where she determines whether the claimant can perform any other work based on the
16 claimant’s RFC, age, education, and work experience. § 404.1520(a)(4)(v). If so, the
17 claimant is not disabled. If not, the claimant is disabled.

18 At step one, the ALJ found that Plaintiff meets the insured status requirements of
19 the Social Security Act through December 31, 2018, and that she has not engaged in
20 substantial gainful activity since July 22, 2014. (A.R. 18.) At step two, the ALJ found that
21 Plaintiff has the following severe impairments: headaches, non-epileptic event disorder,
22 obesity, cognitive disorder, depressive disorder, bipolar disorder, anxiety disorder, and
23 panic disorder. (*Id.*) At step three, the ALJ determined that Plaintiff’s impairments do not
24 meet or equal the severity of one of the listed impairments in Appendix 1 to Subpart P of
25 20 C.F.R. Pt. 404. (*Id.* at 19.) At step four, the ALJ found that Plaintiff:

26 has the [RFC] to perform a full range of work at all exertional
27 levels but with the following nonexertional limitations: the
28 claimant can occasionally balance and climb ramps or stairs,
but can never climb ladders, ropes, or scaffolds. The claimant
can have occasional exposure to excessively loud noises, can
have no exposure to dangerous machinery with moving

1 mechanical parts, can have no exposure to unprotected heights,
2 and cannot drive as part of her job. Mentally, the claimant is
3 limited to tasks that can be learned by demonstration within
4 thirty days, work that does not involve fast-paced work
5 requirements, and work involving minimal, in-person public
6 interaction.

7 (*Id.* at 21.) With this RFC in mind, the ALJ determined that Plaintiff is unable to perform
8 any past relevant work. (*Id.* at 26.) Moving to step five, the ALJ found that there are jobs
9 that exist in significant numbers in the national economy that Plaintiff can perform
10 including those of cleaner (DICOT 381.687-022, 1991 WL 673259), kitchen helper
11 (DICOT 318.687-010, 1991 WL 672755), and hand packager (DICOT 920.587-018, 1991
12 WL 687916). (*Id.* at 28.) Consequently, the ALJ held that Plaintiff had not been disabled
13 through the date of her decision. (*Id.*)

14 **STANDARD OF REVIEW**

15 It is not the district court's role to review the ALJ's decision de novo or otherwise
16 determine whether the claimant is disabled. Rather, the court is limited to reviewing the
17 ALJ's decision to determine whether it "contains legal error or is not supported by
18 substantial evidence." *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial
19 evidence is more than a mere scintilla but less than a preponderance, and "such relevant
20 evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*
21 "Where evidence is susceptible to more than one rational interpretation, the ALJ's decision
22 should be upheld." *Id.* The court, however, "must consider the entire record as a whole
23 and may not affirm simply by isolating a 'specific quantum of supporting evidence.'" *Id.*
24 Nor may the court "affirm the ALJ on a ground upon which he did not rely." *Id.*

25 In determining whether the ALJ committed legal error, the district court is bound to
26 apply the legal standards imposed by the law of this Circuit. This includes the requirement
27 that, unless contradicted by another physician, if "the ALJ wishes to disregard the opinion
28 of the treating physician, he or she must make findings setting forth specific, legitimate
reasons for doing so that are based on substantial evidence in the record." *Murray v.*
Heckler, 722 F.2d 499, 502 (9th Cir. 1983).

DISCUSSION

On appeal, Plaintiff challenges the ALJ's decision on two bases. First, she argues that the ALJ committed reversible error by failing to analyze Plaintiff's psychogenic seizures under Listing 12.07 of the Listing of Impairments during her step three evaluation. Second, she contends that the ALJ erred by improperly rejecting the opinions of her treating physician, Dr. Ronald Bennett, M.D. (Doc. 24 at 10-15.) Having reviewed the record and the parties' briefs, the Court agrees that the ALJ erred by failing to evaluate Plaintiff's psychogenic seizures under Listing 12.07 and by improperly rejecting the medical opinions of Plaintiff's treating physician. Although the ALJ's failure to assess Plaintiff's impairments under Listing 12.07 was harmless, the Court finds the ALJ's rejection of Dr. Bennett's opinions harmful. Therefore, the ALJ's decision must be reversed and remanded for an award of benefits for the reasons explained below.

I. The ALJ's Failure to Evaluate Plaintiff's Psychogenic Seizures Under Listing 12.07 Constitutes Harmless Error.

Plaintiff asserts that, had the ALJ evaluated Plaintiff's impairments under Listing 12.07, as she was required to do, she would have found Plaintiff disabled at step three. (Doc. 14 at 14.) At step three, the ALJ considers whether Plaintiff's impairments meet or equal the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. If Plaintiff's impairments rise to the level of a listed impairment, Plaintiff is disabled.

Here, the ALJ determined that Plaintiff's impairments did not meet or medically equal the criteria of listings 12.02, 12.04 and 12.06. (A.R. 19.) However, the ALJ made no mention of Listing 12.07, Somatic symptom and related disorders, which Plaintiff contends is the appropriate listing to assess Plaintiff's psychogenic seizures. (Doc. 14 at 14.) Somatic symptom and related disorders

are characterized by physical symptoms or deficits that are not intentionally produced or feigned, and that, following clinical investigation, cannot be fully explained by a general medical condition, another mental disorder, the direct effects of a substance, or a culturally sanctioned behavior or experience. These disorders may also be characterized by a preoccupation with having or acquiring a serious medical condition that has not been identified or diagnosed. Symptoms and signs may

1 include, but are not limited to, pain and other abnormalities of
2 sensation, gastrointestinal symptoms, fatigue, a high level of
3 anxiety about personal health status, abnormal motor
movement, *pseudoseizures*, and pseudoneurological
symptoms, such as blindness or deafness.

4 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.07 (emphasis added).

5 Listing 12.07 is the proper listing to assess Plaintiff's psychogenic seizures. The
6 ALJ's failure to explicitly discuss whether Plaintiff's impairments meet or equal Listing
7 12.07 was error. The Court concludes, however, that such error was harmless because the
8 requirements to meet Listing 12.07 are identical to the requirements of Listings 12.02,
9 12.04, and 12.06. *See* C.F.R. pt. 404, Subpt. P, App. 1 § 12.00. The ALJ thoroughly
10 considered the requirements of Listings 12.02, 12.04, and 12.06 and supported her finding
11 that Plaintiff did not meet their standards with substantial evidence. (A.R. 19-20.)
12 Therefore, Plaintiff's assertion that the ALJ would reach a different result when evaluating
13 these identical requirements in the context of Listing 12.07 is unavailing.¹ As a result, this
14 error is not a basis for remand.

15 **II. The ALJ's Rejection of Dr. Bennett's Opinions Constitutes Harmful Error.**

16 Next, Plaintiff argues that the ALJ committed harmful error by improperly giving
17 little weight to the opinion of her treating physician, Dr. Bennett. (Doc. 14 at 10-13.) The
18 Court agrees.

19 To begin, more weight generally should be given to the opinion of a treating
20 physician than to the opinions of non-treating physicians because treating physicians are
21 "employed to cure and [have] a greater opportunity to observe and know the patient as an
22 individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987); *Orn*, 495 F.3d at 631.
23 However, a treating physician's opinion is entitled to controlling weight only if the opinion
24 is well-supported by medically acceptable diagnostic techniques and is not inconsistent
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27 ¹ When whittled to its roots, Plaintiff's argument asserts that, were the Court to
28 *reweigh* evidence concerning the impact of Plaintiff's seizures on her functioning in a
manner favorable to Plaintiff, it would find that Plaintiff's impairments meet or medically
equal Listing 12.07. This is not the Court's standard of review. *See Thomas v. Barnhart*,
278 F.3d 947, 954 (9th Cir. 2002).

1 with other substantial evidence in the case record. 20 C.F.R. §§ 404.1527(d)(2). Even
2 where a treating physician’s opinion is contradicted, it may not be rejected without
3 “specific and legitimate reasons” supported by substantial evidence in the record. *Lester*
4 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

5 In support of her application, Plaintiff offered the opinions of Dr. Bennett, her
6 treating physician. Dr. Bennett noted that Plaintiff had, on average, ten seizures per week
7 and that postictal manifestations could last minutes to hours. (A.R. 270-71.) On July 22,
8 2014, after reviewing one Electroencephalogram (EEG) and performing a second EEG, Dr.
9 Bennett diagnosed Plaintiff with a seizure disorder of deep level origin. (*Id.* at 468, 542.)
10 Further, after reviewing Plaintiff’s records and conducting neurological and physical
11 exams, he opined that Plaintiff’s symptoms would frequently interfere with her attention
12 and concentration, that she was incapable of managing even low stress situations, would
13 need to take daily one-hour breaks at erratic times, would experience unpredictable “highs”
14 and “lows” and would need to miss more than three days of work per month. (*Id.* at 270-
15 74, 534, 543.)

16 The ALJ discounted Dr. Bennett’s opinions, rationalizing that they were based on
17 Plaintiff’s subjective complaints, inconsistent with Plaintiff’s activities, and contrary to
18 certain medical findings in the record. (*Id.* at 25.) At face value, the reasons given by the
19 ALJ are all are specific and legitimate reasons for discounting Dr. Bennett’s opinions. *See*,
20 *e.g.*, *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citations omitted) (“An
21 ALJ may reject a treating physician’s opinion if it is based ‘to a large extent’ on a
22 claimant’s self-reports that have been properly discounted as incredible.”); *Batson v.*
23 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (An ALJ may discredit
24 the opinion of a treating physician that is unsupported by the record as a whole). If
25 founded, these reasons could justify a decision to give Dr. Bennett’s opinions less than
26 controlling weight. In this case, however, substantial evidence does not support the reasons
27 the ALJ gave for rejecting Dr. Bennett’s opinions. *See Holohan v. Massanari*, 246 F.3d
28 1195 (9th Cir. 2001). The Court will address each of the ALJ’s reasons, in turn.

1 **A. Dr. Bennett’s Opinions are not Based Primarily on Plaintiff’s Subjective**
2 **Complaints.**

3 First, the ALJ rejects Dr. Bennett’s opinions, contending that they are based upon
4 Plaintiff’s subjective complaints, rather than objective evidence. (A.R. 25.) However, Dr.
5 Bennett looked to various objective sources to form his conclusions, including Plaintiff’s
6 medical records, the results of neurological and physical exams that he performed on
7 Plaintiff, and two EEGs. (*Id.* at 270-74, 534, 543.) In other words, this is not the case in
8 which rejection of the treating physician’s assessment is appropriate because it was a mere
9 “rehashing of claimant’s own statements[.]” with “little independent analysis or diagnosis.”
10 *Tomasetti*, 533 F.3d at 1041. Consequently, the ALJ’s first reason for rejecting Dr.
11 Bennett’s opinions is unsupported by substantial evidence.

12 **B. Dr. Bennett’s Opinions are not Inconsistent with Plaintiff’s Daily**
13 **Activities.**

14 Second, the ALJ assigned Dr. Bennett’s opinions little weight because she found
15 them inconsistent with Plaintiff’s activities, “including her recent ability to travel to
16 Montana and California, and [] babysitting her granddaughter, albeit currently her mother
17 helps out.” (A.R. 25.) The ALJ’s characterizes Plaintiff’s activities at a high level of
18 generality so as to depict Plaintiff as more functional and independent than her
19 circumstances allow. It is true that Plaintiff took a trip to Montana in order to visit an ailing
20 relative. (*Id.* at 49.) However, Plaintiff was accompanied by family who cared for her as
21 she experienced a seizure on the airplane. (*Id.*) It also is true that Plaintiff visited her
22 mother in California. (*Id.* at 44.) Once again, she was accompanied by family who cared
23 for her during her stay. (*Id.*) Without more, the Court cannot see how the Plaintiff’s ability
24 to go on escorted trips while under the care of her relatives is inconsistent with Dr.
25 Bennett’s findings.

26 Similarly, the ALJ determined that Plaintiff’s ability to care for her infant
27 granddaughter is contrary to Dr. Bennett’s findings. But the ALJ’s portrayal of Plaintiff’s
28 activities overlooks important particulars. Plaintiff has never cared for her granddaughter

1 alone, and experiences seizures while co-babysitting in response to her granddaughter's
2 cries. (*Id.* at 47-48.) The Court is equally unpersuaded that Plaintiff's ability to interact
3 with her granddaughter is inconsistent with Dr. Bennett's findings.

4 Elsewhere in her opinion, the ALJ references additional activities performed by
5 Plaintiff that, although not explicitly mentioned during her rejection of Dr. Bennett's
6 opinions, might be relevant. Particularly, the ALJ notes that Plaintiff "could maintain all
7 aspects of her personal care, care for her dog, perform light housecleaning, wash the dishes,
8 prepare simple meals, crochet and cross stitch, manage her finances, use a computer, watch
9 television, leave the house daily, shop for groceries, and dine out in restaurants." (*Id.* at 24
10 (citing Ex. 4E at 2-5).) But again, this broad generalization of Plaintiff's abilities
11 mischaracterizes her condition. In the same exhibit cited by the ALJ to support her
12 characterization, Plaintiff explains that she needs reminders to perform personal care or
13 household tasks, her boyfriend primarily cares for their dog, she cannot cook a simple meal
14 without having a seizure, she can only crochet or cross stitch approximately once or twice
15 a month due to hand tremors, is always accompanied when leaving the house, and only
16 shops in the early morning with her daughter to avoid exposure to crowds. (*Id.* at 235.)
17 The omitted information included in the same three pages cited by the ALJ, alone, paints a
18 very different picture of Plaintiff's state.

19 Regardless, Plaintiff's ability to perform any of these activities on a good day, even
20 as the ALJ describes them, is not inconsistent with Dr. Bennett's conclusion that can be
21 boiled down to the following: Plaintiff's condition is inherently erratic. There will be good
22 times and bad times, and the bad times proscribe employment. In sum, the ALJ's second
23 reason for rejecting Dr. Bennett's opinions is unsupported by substantial evidence.

24 **C. Dr. Bennett's Opinions are not Contrary to "Normal" Medical Findings.**

25 Third, the ALJ assigned Dr. Bennett's opinions little weight because the ALJ
26 determined they "contradict the medical findings of normal ambulation, strength,
27 movement, behavior, and thought, which suggest that her episodes do not cause long-
28

1 lasting limitations.” (A.R. 25 (citing Exs. 2F, 3F, 7F-11F, 13F-15F, 21F-27F).)² Dr.
2 Bennett opined that Plaintiff will have both good days and bad; although she might be able
3 to function at a higher level occasionally, her “downs” will cause her to require random
4 breaks and to miss so much work as to render her unemployable. The existence of
5 relatively normal results from cursory physical evaluations is not inconsistent with this
6 conclusion. Nor is the suggestion that Plaintiff’s episodes do not cause “long lasting
7 limitations” necessarily inconsistent. Rather, the exhibits cited by the ALJ *support* the
8 conclusion that Plaintiff has “variable abilities . . . given the frequency and unpredictability
9 of her seizures.” (*Id.* at 552.) For example, although these records reflect that Plaintiff
10 appeared oriented and with normal mood, affect and strength on various occasions (*Id.* at
11 367, 387, 399, 458, 464, 482, 506-07, 569, 573), at others she was disoriented, confused,
12 and tearful and exhibited word-finding difficulties, poor responsiveness, tremors, slow
13 processing, and memory problems (*Id.* at 375, 398, 401, 406, 548-49, 551). Dr. Bennett
14 does not opine that Plaintiff exhibits irregular functioning constantly or even most of the
15 time. The records cited by the ALJ therefore do not contradict Dr. Bennett’s conclusions.
16 As a result, the ALJ’s third reason for rejecting Dr. Bennett’s opinions is unsupported by
17 substantial evidence.

18 Because the reasons offered by the ALJ are not supported by substantial evidence,
19 the ALJ erred in giving only “little weight” to Dr. Bennett’s opinions. Such error was
20 harmful because assigning controlling weight to Dr. Bennett’s opinions would necessitate

21 ² To reject a treating physician’s opinion based on inconsistent evidence, “an ALJ
22 ‘can satisfy the substantial evidence requirement by setting out a detailed and thorough
23 summary of the facts and conflicting clinical evidence, stating [her] interpretation thereof
24 and making findings. The ALJ must do more than state conclusions. [She] must set forth
25 [her] own interpretations and explain why they, rather than the doctors[], are correct.”
26 *Garrison v. Colvin*, 759 F. 3d 995, 1014 n. 17 (9th Cir. 2014). The Court is unpersuaded
27 that the ALJ met this standard, here. The ALJ cited, without further explanation, to
28 hundreds of pages of exhibits for the Court to sift through in an effort to determine what
data constituted the “medical findings of normal ambulation, strength, movement, behavior
and thought” that justified her conclusion. The ALJ also provided no guidance as to why
she rejected evidence of irregular functioning that was often on the very same page as
evidence citing normal functioning. However, the Court need not decide whether this
particular standard was met because it finds that the ALJ failed to meet the substantial
evidence requirement for other reasons.

1 a finding of disability.³

2 **III. Scope of Remand**

3 Having determined that the ALJ committed reversible error, the Court has discretion
4 to remand the case for further development of the record, or to credit the improperly
5 rejected evidence as true and remand for an award benefits. *See Garrison*, 759 F.3d at
6 1019. Under the credit-as-true rule, in deciding whether to remand for an award of
7 benefits, the Court considers whether: (1) the ALJ failed to provide legally sufficient
8 reasons for rejecting evidence, (2) the record has been fully developed and further
9 proceedings would serve no useful purpose, and (3) it is clear from the record that the ALJ
10 would be required to find the claimant disabled were such evidence credited. *Triechler v.*
11 *Comm’r of Soc. Sec.*, 775 F.3d 1090, 1100-01 (9th Cir. 2014). If all three conditions are
12 met, an award of benefits is appropriate. All three conditions of the credit-as-true-rule are
13 met here.

14 First, as explained above, the Court finds that the ALJ’s decision to discount Dr.
15 Bennett’s opinions is unsupported by substantial evidence. Second, because the ALJ’s
16 error was not due to a failure to develop the record, further proceedings would serve no
17 useful purpose. Finally, during the hearing, the VE testified that someone with the
18 limitations assessed by Dr. Bennett would be unable to perform Plaintiff’s past relevant
19 work or other work. (A.R. 61.) Accordingly, if Dr. Bennett’s opinions were credited as
20 true, the ALJ would be required to find Plaintiff disabled. The Court therefore exercises
21 its discretion to remand for an award of benefits.

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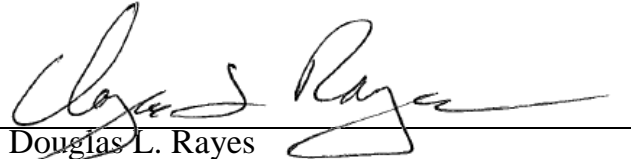
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27 ³ The VE testified that if Plaintiff’s condition requires her to miss three or more days
28 of work per month, as assessed by Dr. Bennett, it would disqualify her from competitive
employment. (A.R. 61.) As a reminder, “[o]ne does not need to be ‘utterly incapacitated’
in order to be disabled.” *Vertigan v. Halter*, 260 F. 3d 1044, 1050 (9th Cir. 2001) (citing
Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).

1 **IT IS ORDERED** that the final decision of the Commissioner of Social Security is
2 **REVERSED** and the case **REMANDED** for an award of benefits. The Clerk shall enter
3 judgment accordingly and terminate the case.

4 Dated this 24th day of September, 2019.

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8 
9 Douglas L. Rayes
United States District Judge